

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 13,720

)

Appeal of )

)

INTRODUCTION

The petitioner requests expungement of two findings by the Department of Social and Rehabilitation Services (SRS) that he sexually abused his three-year-old daughter.

FINDINGS OF FACT

1. On July 24, 1992, SRS received a report from Catholic Charities that M.M., the petitioner's three year old daughter, may have been sexually abused by someone, perhaps a young cousin. An experienced investigator was assigned to the case who interviewed the child's mother, the child herself and the child's father, as well as an aunt of the child and a psychologist who was treating the child. Based upon those interviews, which were not recorded in a verbatim manner, the investigator determined that the child had been sexually abused by her father, the petitioner, and notified him on August 4, 1992 that he had been found to have fondled and to have had intercourse and genital-anal contact with his daughter. Based on further reports that the child had made additional disclosures, a further investigation was commenced on October 21, 1992, which included observation of the child in a therapy session, again not recorded in a verbatim manner, which resulted in a second finding on December 1, 1992, that the petitioner had genital/oral contact with his daughter and had wrongfully confined her.
2. The petitioner, who was a school maintenance worker, was suspended from his job because of these findings and a criminal action was brought against him. The criminal action was dismissed in May of 1995, based on the state's inability to demonstrate the child's competency to understand and describe the events which had allegedly occurred. On June 23, 1995, the petitioner requested expungement of the civil findings made by SRS.
3. At hearing, the Department presented the testimony of its investigator and all of the principal witnesses who were interviewed for the findings, except the child herself. SRS' allegations that it would be harmful for the child to be questioned about this matter again was found to be accurate based on testimony of her psychologist that the child had been severely traumatized and had a slow recovery from the abuse, which recovery could be jeopardized by forcing her to relive the events. The petitioner objected to the other witnesses relaying the child's testimony which objection was overruled as a matter of admissibility of the evidence but was taken under advisement as to the weight to be given to these

statements. The facts in the following paragraphs are found based on the testimony of those witnesses.

4. The child's mother was married to and living with the petitioner and their three-year-old daughter, M.M., as well as an infant daughter at the time the allegations first arose. There were no particular problems in the marriage and the parties were not contemplating a divorce. The mother worked in the evenings while the father babysat the children. M.M. had no particular health problems other than chronic constipation for which she had been given anal suppositories.

5. On July 21, 1992, the mother observed her three-year-old daughter hiding under the covers with her underpants off and heard her suggesting to a younger male cousin that he "put his pee pee into her potty", which the mother interpreted as penis and vagina, respectively. Concerned about her daughter's apparent familiarity with a sexual act, she asked her where she could have heard something like that. The child replied first that she had heard it from a teacher, then she said it was a babysitter and finally she named an older (six-year old) cousin.

6. The mother reported this conversation to the child's father who dismissed it as unimportant. The next day, still worried about this event, M.M.'s mother contacted the older cousin's mother, who is her sister, and reported the incident and the child's allegation that the sister's son had been the one who taught her this information.

7. On July 22, 1995, the mother's sister then took it upon herself to investigate the matter. She asked her own six year old son, who had himself been sexually abused about a year before, if he had ever been alone with M.M. and he denied it which denial the sister found believable. Although she has no formal training in investigating or treating sexual abuse, the sister interviewed M.M. using informational pamphlets on child sexual abuse she had in her possession from her own child's sexual abuse. She questioned her niece using dolls and family pictures, techniques she had become familiar with during her sons's ordeal which involved fondling by another child. The mother's sister had a conversation with M.M. regarding good and bad touches in which the child said at some point that a doll had received "bad touches" and pointed to a picture of her father in a family portrait when asked who had given the doll those touches. When asked whether she had received "bad touches", M.M. became upset and withdrew. There is no recording of the conversation between the aunt and M.M.

8. The sister told M.M.'s mother what M.M. had said about the doll and her father and added that she did not know what to make of it. The mother did not conclude from the report that the father was the perpetrator but she told her husband about the child's statements. On July 23, 1995, the mother accompanied by her sister took the child to see a social worker who reported to SRS that the child may have been abused by someone.

9. Puzzled and concerned by her daughter's statements, the mother took her children, including M.M., and went to stay with her sister for a few days but returned home upon her husband's insistence. While she was at her sister's home, M.M., who has a lengthy history of constipation, tried unsuccessfully to move her bowels. Her aunt was in the bathroom with her and asked whether anyone had put anything in her rear end. The child answered that "thumbs" were put in her rear and her vagina but she would not identify who had done so.

10. After returning home, the mother herself questioned M.M. about sexual abuse. She asked her daughter if she had ever had a wrong touch. The child replied yes but "I can't tell. I can't tell." Her mother asked if it was a big person like her to which the child replied by putting her hand over her

mouth and stating that "I can't tell." The mother then got a family picture with twelve people in it and asked if the person was in it. The child went along the picture with an eraser and placed the eraser over her father's picture saying, "Daddy did it." The child then started crying and asked her mother not to tell him. They then both went to take a nap. When they awoke the child saw her father who had come home from work and said "I told" and pointed to her privates. The petitioner vehemently denied that he had done anything to M.M.

11. At first the mother did not believe that her husband could have sexually abused her daughter but gradually began to think it was true after further questioning of her daughter. When she asked her daughter why she could not have shared this information with her mother earlier, the daughter said "If I told you I would die." When asked how, her daughter disclosed that her father had threatened to cut up her Raggedy Ann doll with a knife and put it in the dumpster if she told. She added that he had actually done that. She also told her mother that her father stuck his finger in her "rear" and asked her to do the same to him. The mother was unable to find any doll that had been cut up. However, she felt she could no longer disbelieve her child because in her opinion M.M. was too young to have been making up all of these actions and threats.

12. Both parents accompanied the child to the SRS interview on July 27, 1992. Thereafter, the petitioner and his wife separated.

13. Some months later during another conversation between the mother and M.M., the child said that her father had tied her arms behind her in a chair and had put his "stick" in her mouth. The mother had never heard her use the word "stick" before for penis but assumed that was what the child meant. She reported these further allegations to SRS and the child was again interviewed.

14. A qualified child psychologist treated M.M. at the request of SRS and her mother from August of 1992 through March of 1994, in about two dozen sessions. M.M. was described as disturbed, erratic, aggressive and out of control with a frightened affect and who had difficulty answering direct questions. She was having nightmares and difficulty going to the bathroom. She was diagnosed as a probable victim of sexual abuse and received treatment accordingly.

At the first session, the mother reported to the therapist that the child had been abused by her father, although she indicated that at least two other people had been named as potential perpetrators. The child refused to speak until the third session (August 19, 1992) when she said that "Dad put a stick in her privates" and said that he would cut her with a knife if she told. She made no further disclosures until November 25 when she showed a father doll on top of a child doll and said that the father was "doing his thing". When asked to explain this remark she said "puts his private inside her private." The January 1993, notes indicate that the mother was angry with the child because she failed to make disclosures during her deposition in the criminal trial. In June of 1993, the child said that her father tied her to a chair and "put his privates in her private."

There are no transcripts of the conversations during any of these sessions. Questions asked of the child were not recorded because the focus of the psychologist was treatment rather than investigation. Disclosure focused on what the child felt rather than the details of the abuse. Although the child's use of the term "privates" was felt to be age appropriate, no attempt was made to discover what the child actually meant by that term.

14. The SRS investigator received a report from Catholic Charities on July 24, 1992, that the child,

M.M. had said that someone had put his "thumb in her potty". Because the initial report indicated the abuser could be a juvenile as well as the father, no police officers were brought in. M.M. was interviewed at the SRS office and was first questioned with regard to her level of understanding and ability to tell the truth from a lie to the investigator's satisfaction. During the interview, the child stated that her father touched her and pointed to her vagina to show where and held up her thumb to show with what. The child was also asked if anyone else had also done this to her which she denied.

15. The mother was also interviewed and, after a trooper was called in, the father. The mother told essentially the same story related at hearing. The father denied any wrongdoing with his daughter stating only that he had wiped her after she used the bathroom.

16. On August 19, 1992, the SRS worker and the trooper also watched the child's interview with her psychologist through a two-way mirror. At that time, she heard the child say that her father put "his stick in her bottom" and that he had threatened to cut up a doll if she told. After hearing this information, the SRS investigator in consultation with her supervisor, decided to found the incident as sexual abuse of the child by the father.

17. The case was closed but reopened in October of 1992 after the mother reported further disclosures by the child. The child was again interviewed but she refused to talk about sexual abuse. She then went into a bathroom and got a small step-stool and said that her father had put her in a chair in the bedroom. She said, "Daddy tied my hands back there and put his stick in my mouth." She gave no other details as to the time, place or number of instances. The investigator did not talk with the petitioner about the allegations as the police had planned to do that. On the basis of the interview with M.M., a finding of physical abuse by confinement and genital/oral contact was made.

18. The Vermont State police investigator present at the initial interview with SRS on July 27, 1992 made a tape recording and transcript of that interview. However, neither were produced at hearing. He was also present at the interview on the second report of abuse in October of 1992 but made no recording of that session. He could not recall any of the child's specific statements although he remembered that he could not get much out of her.

19. On September 10, 1992, the child was examined by a medical doctor who makes a specialty of child sexual abuse cases. She found a discontinuity in M.M.'s hymenal ring at 3 o'clock. She categorized this finding as one more commonly seen in children who are sexually abused but which can also be found in non-abused children and could be the result of a congenital abnormality as well as trauma. She also found a possible healed fissure in her anus at 7 o'clock. She categorized this finding as one which could be seen in any child and could be the result of sexual abuse or bad constipation. Her findings are found to be accurate and accepted as findings herein.

20. The petitioner has consistently denied the allegations and did the same at the hearing.

21. The statements made by M.M.'s mother and aunt as well as those made by the SRS social worker and the child's therapist as to M.M.'s statements are found to be sincere efforts to recall what the child actually said and contain a good deal of internal consistency. The Board concludes that the above findings compellingly establish that the petitioner was the perpetrator of the sexual abuse of M.M.

#### ORDER

The petitioner's request to expunge the two findings by SRS that he abused his daughter is denied.

### REASONS

The petitioner has made application for an order expunging the record of the two alleged incidents of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

...

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing that a child has been abused or neglected. In re Bushey-Combs 160 Vt 326, 628 A.2d 541 (1993). 33 V.S.A. § 4912(10);.

"Sexual abuse" is specifically defined by 33 V.S.A. § 4912 as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this matter, as is most often the case, there were no witnesses to the alleged abuse and no determinative physical evidence although the latter in combination with the psychological profile strongly suggest that she was abused by someone. The Department's finding that the father abused her rests solely on the credibility of the alleged victim. The Board has often acknowledged that in such circumstances only two individuals, the alleged perpetrator and victim, will ever know for certain if the incident occurred. In such cases, however, if the alleged victim's allegations are deemed to be credible, and those allegations are deemed to constitute sexual abuse, the Department's decision must be affirmed.

The Department in this matter offered the child's testimony through the testimony of several persons, including both relatives and professionals who had talked with her. The admission of these otherwise hearsay statements was made under the Board's "relaxed hearsay" rule which has been interpreted repeatedly by the Board as allowing in hearsay testimony of children in expungement hearings as a

policy matter to avoid further traumatization and hardship for the victim. See Fair Hearing Rule No. 12. Such an evidentiary admission is also well supported by Vermont Rule of Evidence 807 which specifically allows a Court to take into evidence a child's testimony recorded outside of the courtroom in cases involving sexual assault if a substantial risk of trauma is present which would impair the ability of the child to testify.

While the admission of the hearsay testimony itself is not inappropriate, the quality of that testimony must be carefully scrutinized. In light of the hearing officer's finding that the Department's witnesses were credible, the majority of the Board believes that the only consistent and reasonable conclusion to be drawn from the evidence presented is that the petitioner was the perpetrator of the sexual abuse of M.M. See Fair Hearing Rule No. 18. Therefore, the petitioner's request to expunge the reports in question is denied.

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